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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

SOCIETE INTERNATIONALE, etc., *Petitioner*

v.

WALLY KELBERINE and LENKA BERLIN, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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SOCIETE INTERNATIONALE, etc.,[1] *Petitioner*

v.

WALLY KELBERINE and LENKA BERLIN, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, a Swiss holding corporation having its sole place of business in Basel, Switzerland,[2] prays that a writ of certiorari issue to review Section II of the Opinion of the United States Court of Appeals for the District of Columbia, rendered in the above entitled case on April 7, 1966.

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[1] Petitioner is also known as Interhandel, and may be so referred to herein from time to time.

[2] This is the same corporation which was petitioner in *Societe Internationale* v. *Rogers*, 357 U.S. 197, 2 L.Ed. 2d 1255 (1958).

OPINION BELOW

The opinion of the Court of Appeals is reported at U.S. App. D.C. , F. 2d , and appears in Appendix A to this brief. Petitions for rehearing by the deciding panel or rehearing *en banc* were denied on June 16, 1966.

JURISDICTION

The judgment of the Court of Appeals was entered on April 7, 1966 (R. 213), affirming the order of dismissal of the district court. A petition for rehearing by the deciding panel or rehearing *en banc,* in respect of Section II of the lower court's opinion, was filed by this Petitioner on April 22, 1966 and denied by the Court of Appeals on June 16, 1966.[3] A petition for rehearing by the deciding panel was filed by the Respondents on April 21, 1966 and unanimously denied on June 16, 1966. (R. 233).

The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals acted erroneously, violating procedural due process and departing from accepted and usual course of judicial proceedings, when it approved, in the instant action, *in personam*

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[3] Societe Internationale's petition for rehearing by the deciding panel was denied by a vote of two to one (Senior Circuit Judge Wilbur K. Miller voting for a rehearing) (R. 231); and petition for rehearing *en banc* was denied by the following order (R. 232):

> "On consideration of the petition of appellee, Societe Internationale, etc., for rehearing *en banc,* and the responsive pleadings filed thereto, and there not being a majority of the circuit judges of this circuit in favor of a rehearing of the above-entitled case by the court *en banc,* the petition for rehearing *en banc* is hereby denied."

jurisdiction over a nonresident, foreign corporation solely on the basis of summons being served upon a Washington, D. C., practicing lawyer who, in that capacity only and not as a resident agent or otherwise, represented the foreign corporation in a separate and wholly independent Section 9(a) Trading with the Enemy Act suit against the Attorney General in the United States District Court for the District of Columbia, the only court where the foreign corporation could file such an action.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The pertinent portions of the Fifth Amendment to the Constitution of the United States, of the Trading with the Enemy Act and of District of Columbia Code provisions, if not quoted in the text, are set forth in Appendix B to this brief.

STATEMENT OF THE CASE

On February 16, 1942, the United States Government, pursuant to the Trading with the Enemy Act, 50 U.S.C. App. Sections 1, *et seq.*, seized Interhandel's stock in General Aniline and Film Corporation. (R. 203) In 1948, John J. Wilson, a practicing attorney in the District of Columbia, on behalf of his client, Interhandel, filed suit under Section 9(a) of the Act against the then Attorney General to recover the seized property. *Sub. nom., Societe Internationale* v. *McGrath,* Civil Action No. 4360-48, United States District Court for the District of Columbia. (R. 31, 203) Interhandel is a Swiss corporation having its sole place of business in Basel, Switzerland, and under Section 9(a) of the Act, the District of Columbia was the one and only jurisdiction open to Interhandel in which

it could litigate its claim to the property seized by the Government. (R. 33)

After filing the suit in 1948, Wilson, as attorney, prosecuted the suit until a settlement was achieved and a Stipulation of Settlement, entered into by the Attorney General and Interhandel, was filed with the District Court, dated December 20, 1963, and amended March 25, 1964 (R. 78-92). The settlement envisaged the dismissal of the pending civil action (which has been accomplished), and Section III(1)(e) of the Stipulation provided as follows (R. 80):

> "[That Interhandel would] Deliver to the Attorney General an instrument, in form satisfactory to the Attorney General evidencing that it has appointed John J. Wilson as attorney-in-fact to accept service of process on its behalf for such proceedings *between the parties to this Stipulation* [the Attorney General, the Treasurer of the United States and Interhandel] as may be necessary to the interpretation or enforcement, or both, of this Stipulation or any judgment concluding the Action between Interhandel and the Defendants, *but for no other purpose and no other extent whatsoever.*" (Emphasis supplied)

The power of attorney was delivered and it, too, was expressly delimited by the foregoing italicised phrase "but for no other purpose and no other extent whatsoever."[4] (R. 34)

In March 1965, the shares of stock were sold and, under the terms of the Stipulation of Settlement, some

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[4] The Court of Appeals stated that it did not "rest" upon that power (App. A, p. 6a). This remark was preceded by an effort to make the language of the provision fit the facts of the case (App. A, p. 6a). This, Petitioner submits, was not even remotely justified.

One Hundred Twenty-one Million Dollars ($121,000,000) were deposited in a special account in the Treasury to be held for indemnity of the United States, and, to the extent not so consumed, ultimate distribution to Interhandel. (R. 9, 203).

On March 16, 1965, Respondents, purporting to represent a class of more than 200,000 persons, filed a complaint in the United States District Court for the District of Columbia against Petitioner and the Attorney General and the Secretary of the Treasury of the United States. The suit sought to enjoin the Attorney General and the Secretary from paying to Interhandel any part of the funds being held by the Treasury in the special account.[5] It also sought an adjudication that the Respondents as a class had a right to this fund. (R. 8-14).

Respondents based their claim to the fund on the damages they allegedly suffered as a result of the Nazi conspiracy in Europe between 1933 and 1945, alleging that a number of men and corporations in Europe acted in a gigantic conspiracy in the course of which the Respondents and members of the class they represent were killed, forced into slave labor and had their properties confiscated. They also alleged that I. G. Farbenindustrie (Farben), a corporation, was an integral part of the conspiracy; that Interhandel was

[5] Respondents' applications for injunctive relief were denied: (1) by the district court (Jones, J.) on April 9, 1965; (2) by the Court of Appeals (Fahy, Washington and McGowan, JJ.) on April 12, 1965; (3) by Chief Justice Warren on April 14, 1965; (4) by Mr. Justice Harlan (*ex parte*) on April 14, 1965; and (5) by the Court of Appeals again (Fahy, Washington and McGowan, JJ.) on May 6, 1965.

The lower court is mistaken in stating that payment of Interhandel's share has been delayed "by this law suit." (App. A, p. 2a).

created by Farben and, therefore, should be held accountable for Farben's acts to the extent of Interhandel's property within the United States. (R. 9-10).

Respondents attempted to effect service on Interhandel (1) by serving Wilson as "attorney and agent for Interhandel" (R. 31-32), and (2) by serving the Superintendent of Corporations for the District of Columbia, as "statutory agent" for Interhandel pursuant to Section 29-933(i)(c) of the District of Columbia Code (1961 Ed. Supp. V). (App. B) (R. 30). Interhandel filed motions to dismiss and/or quash both of the attempted services of process on the grounds that it was not subject to process in the District of Columbia and it had not been properly served. (R. 29-30).

The record shows that Interhandel has never transacted business in the District of Columbia; it never has had an office here; it never has been licensed or qualified to do business in the District of Columbia; and, except for the limited power of attorney granted Wilson, it never has appointed or has had an agent to accept service of process in the District of Columbia. (R. 32-33).

The record is clear that Interhandel's activities in the District of Columbia were entirely related to its participation as plaintiff in Civil Action No. 4360-48, the Trading with the Enemy Act suit. As such, Interhandel did nothing more than any other litigant. It prosecuted and ultimately settled its case. There is not one iota of evidence that Interhandel's *nexus* with the District of Columbia went beyond its activities as plaintiff in that civil action.

The district court granted the Government-defendants' motion to dismiss, quashed the service of process

on Wilson and the Superintendent of Corporations, and dismissed the complaint as to all defendants. (R. 200).

The Court of Appeals affirmed the dismissal of the complaint against the Government-defendants, holding that the action as to them was a suit against the United States which had not consented to being sued. The Court of Appeals also held that the complaint was correctly dismissed for failure to state a claim upon which relief can be granted. However, it further held in Section II of its opinion (1) that Interhandel was subject to the court's jurisdiction because its Trading with the Enemy Act suit was instituted and prosecuted in the District; and (2) that the service of process upon Interhandel's attorney was valid and effective for *in personam* jurisdiction over Interhandel.[6]

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[6] The lower court did not pursue the service of process upon the Superintendent of Corporations under Section 29-933(i)(c) D.C. Code (1961 Ed., Supp. V) (App. B), see *infra*, p. 6. It rejected Interhandel's contention, erroneously, Petitioner submits, that the waiver provision of section 29-933(b) D.C. Code (1961 Ed.) means that carrying on litigation is not transacting business. (App. A, p. 5a) That section provides that

> "A foreign corporation shall not be required to procure a certificate of authority merely for the prosecution of litigation, the collection of debts, or the taking of security for the same, * * *"

The appeals court reasoned only negatively; it did not hold affirmatively that "carrying on litigation" amounted to "transacting business", stating (App. A, p. 5a):

> "Furthermore the liability of a foreign corporation to suit here does not depend upon its doing business here, *it depends upon its being found here.*" (Emphasis supplied)

REASONS FOR GRANTING THE WRIT

A. Introductory

This petition is directed to Section II of the Opinion of the Court of Appeals of April 7, 1966 which, without citation of authority,[7] reached the following precedent-shattering conclusions:

> 1. That a nonresident foreign corporation is subject to the *in personam* jurisdiction of the courts of the District of Columbia in any and all actions simply because, being engaged in one piece of litigation in the District of Columbia, it was "found" there.
>
> 2. That the lawyer representing such foreign corporation in one action may be served with process as its "agent" in a wholly different and independent suit.

Petitioner submits that the pronouncements made by the Court of Appeals in Section II are not only in conflict with decisions of this Court, but that they are also in conflict with its own decisions, as well as the decisions of the Federal and State courts throughout the land.

Petitioner also submits that Section II of the decision of the Court of Appeals unconstitutionally denies Petitioner due process of law under the Fifth Amendment to the Constitution of the United States.

The importance of this decision to the fair administration of justice is underscored by the fact that the

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[7] Footnote 6 to the opinion (App. A, p. 5a) states that the "found" feature of the local statute, cited as D.C. Code Section 11-306 (1961 Ed.) (footnote 5 to opinion)) was discussed briefly by this Court in *Graham* v. *Brotherhood of Firemen*, 338 U.S. 232, 236, 94 L. Ed. 24 (1949). Petitioner submits that the *Graham* decision sheds absolutely no light upon the problem here involved.

District of Columbia is the only jurisdiction in which Interhandel could have filed suit for the return of its seized property (50 U.S.C. App. 9(a)). If the decision below is permitted to stand, then it must follow that a nonresident corporation would also be subject to the jurisdiction of the court, and its attorney subject to service of process as its agent, if it became involved in litigation before the Court of Claims, the Tax Court, the Court of Customs and Patent Appeals, or even before any of the numerous administrative agencies in the District of Columbia. Thus, the principles enunciated in Section II would apply to a corporation organized, located and doing business only in, say, Hawaii if, as the result of litigation instituted outside of the District of Columbia, such corporation petitioned this Court for a writ of certiorari.

B. The Court of Appeals Ignored Uniform Law in Holding That Interhandel Was Subject to the Jurisdiction of the District Court

The District of Columbia Code vests the United States District Court for the District of Columbia with original jurisdiction of all civil actions where either or both of the parties "are resident or found" within the District (Title 11 Section 521(a) (D.C. Code 1961 Ed. Supp. V, App. B).[8] Section 521(b) provides that an action may not be brought by original process unless the defendant is "resident or found" within the District.

Admittedly, Interhandel is not a resident of the District of Columbia. Thus, the lower court could have

[8] Prior to December 23, 1963, the substance of Section 521 was embodied in Sections 305-6 and 308.

had *in personam* jurisdiction over Interhandel only if it were "found" in the District.

The Court of Appeals held:

> "* * * We think the institution and prosecution of a civil action in the court here clearly establishes the presence of the corporation here. It voluntarily subjected itself to the jurisdiction of the court; it could not do so *in absentia*. So we think Interhandel was clearly found here." (App. A, p. 5a)

This conclusion is erroneous for a number of reasons:

1. The threshold finding that Interhandel's institution of suit here was *voluntary*, completely overlooks the fact that Interhandel had no choice or opportunity to select a forum. The United States had seized Interhandel's property and, under Section 9(a) of the Trading with the Enemy Act, this was the only jurisdiction open to Interhandel. Interhandel was compelled to sue here or forego its claim.[9] Thus, in considering the jurisdictional question, Interhandel

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[9] The atypical character of Interhandel's status as a plaintiff was recognized by this Court in *Societe Internationale* v. *Rogers*, 357 U.S. 197, 2 L.Ed. 2d 1255 (1958):

> "* * * Certainly substantial constitutional questions are provoked by such action. Their gravity is accented in the present case where petitioner, though cast in the role of *plaintiff*, cannot be deemed to be in the customary role of a party invoking the aid of a court to vindicate rights asserted against another. Rather petitioner's position is more analogous to that of a *defendant* for it belatedly challenges the Government's action by now protesting against a seizure and seeking the recovery of assets which were summarily possessed by the Alien Property Custodian without the opportunity for protest by any party claiming that seizure was unjustified under the Trading with the Enemy Act.* * *" (p. 210 of 357 U.S.; p. 1266 of 2 L.Ed. 2d)

should be regarded as a defendant which was brought into the District of Columbia by Government action.

2. The lower court's determination as to the meaning to be attributed to "found" is in conflict with the treatment of that term by this Court. *United States* v. *Scophony Corporation,* 333 U.S. 795, 92 L. Ed. 1091 (1948).

In *Scophony,* this Court endorsed the liberalization of the term "transacts business" in Section 12 of the Clayton Act (15 U.S.C. 22) as developed in *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U.S. 359, 71 L. Ed. 684 (1927), but left undisturbed the definition of "found" as created in *People's Tobacco Co.* v. *American Tobacco Co.,* 246 U.S. 79, 62 L. Ed. 587 (1918); and, moreover, recognized that the "found" test required much more "presence" than did the elements of "transacting business". This Court said at page 807 of 333 U.S.:

> "This construction [*Eastman* case] gave the words 'transacts business' a much broader meaning for establishing venue than the concept of 'carrying on business' denoted by 'found' under the pre-existing statute and decisions."

Referring back to the *People's Tobacco* case, this Court said that "found" was equated in sequence to "presence", to "doing business by its agents there", to "of a character warranting inference of subjection to the local jurisdiction" (p. 805 of 333 U.S.).

The lower court erroneously chose "found" as a term more liberal in scope for service of process upon a nonresident corporate defendant, than the term "transacting business". It is just the opposite, as recognized in *Scophony.* Thus, if the court below was unwilling to rest its decision on the term "transacting business",

even if construed in accordance with this Court's "practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character'." (p. 807 of 333 U.S.), it should not have resorted to "found" as an easier test. The teaching of *Scophony*, and its discussion of earlier cases in this Court, are that while the elements of "transacting business" may be included in the term "found", the more stringent requirements of "found" are not included in the definition of "transacting business".

The definition of "found", as contained in the *People's Tobacco* case, is the one which the Court of Appeals was obliged to employ in the case at bar, but it is obvious that it is not the one that the court actually followed. The lower court may have shied away from the determination that Petitioner was "transacting business" here because of the obvious difficulty in equating the "carrying on of litigation", to the "carrying on of business". It does not result, however, that the simpler *word* "found" provided the more elastic definition. As stated above, the very opposite is true.

3. The decision is also contrary to cases in the District of Columbia.[10] For example, Senior Circuit

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[10] The Court of Appeals' decision in the instant case, in effect, overrules *sub silentio* earlier decisions of the Court in the sense that the "doing business" test was applied to them, instead of the "found" test, which, as applied here, could have been satisfied in the following cases: *Fandel* v. *Arabian American Oil Company*, 120 U.S. App. D.C. 193, 345 F. 2d 87 (1965); *Collins* v. *New York Central System*, 117 U.S. App. D.C. 182, 327 F. 2d 880 (1963); *Traher* v. *DeHavilland Aircraft of Canada, Ltd.*, 111 U.S. App. D.C. 33, 294 F. 2d 229 (1961), *cert. den.* 368 U.S. 387 (1962); *Mueller Brass Co.* v. *Alexander Milburn Co.*, 80 U.S. App. D.C. 274, 152 F. 2d 142 (1945); *Layne* v. *Tribune Co.*, 63 App. D.C. 213, 71 F. 2d 223, *cert. den.* 293 U.S. 572 (1934); and *Neely* v. *Philadelphia Inquirer Co.*, 61 App. D.C. 334, 62 F. 2d 873 (1932).

Judge Prettyman, the author of the lower court's opinion, had, in effect, in an earlier decision, equated the terms "found" and "doing business", as applicable to corporate entities under Section 11-306 D.C. Code (1961 Ed.) (the predecessor of Section 11-521), and under Section 13-103. *Fehlhaber Pile Co.* v. *Tennessee Valley Authority,* 81 U.S. App. D.C. 124, 155 F. 2d 864 (1946).

C. The Court of Appeals Departed from Universally Accepted Principles in Making a Lawyer an Agent for Service of Original Process Upon His Nonresident Client

1. It has long been settled that a nonresident party litigant is exempt from service of process at the place of the litigation. *Stewart* v. *Ramsay,* 242 U.S. 128, 61 L. Ed. 192 (1916); *Page Co.* v. *MacDonald,* 261 U.S. 446, 67 L. Ed. 737 (1922); *Schwarz* v. *Thomas,* 95 U.S. App. D.C. 365, 222 F. 2d 305 (1955); *Church* v. *Church,* 50 App. D.C. 239, 270 F. 361 (1921); *Hale* v. *Wharton,* C.C., 1896, 73 F. 739; *Shapiro* v. *Glass,* 348 F. 2d 460 (2d Cir. 1965); *Marlowe* v. *Baird,* 301 F. 2d 169 (6th Cir. 1962); and *Walker* v. *Calada Materials Co.,* 309 F. 2d 74 (10th Cir. 1962).

Ignoring this principle is *per se* startling. *A fortiori,* service upon the party's lawyer compounds the departure.

2. The transformation of a lawyer, rendering ordinary and normal professional services, to the status of an "agent", in order to justify service upon him as service upon his client, is extremely novel.

In the entire text of Section II of its opinion, not once did the Court refer to Mr. Wilson as an attorney. This could not have been because of the limited power of attorney granted him pursuant to a provision of

the settlement agreement, since the Court stated that it did not "rest" upon such power.[11] (App. A. p. 6a).

Instead, the Court of Appeals took the extreme position that the attorney who conducted Interhandel's Section 9(a) suit in the District, became its agent for the service of process in another action. It found the second action "reasonably within the ambit of those [related to the first action] tasks" (App. A, p. 6a);[12] but obviously realizing how far it had gone, the court below stated that it intended its "ruling to be no broader than the case" (App. A, p. 6a). It then restated its ruling as follows (App. A, p. 6a):

> "* * * We hold that, if a foreign corporation comes into the District of Columbia for the purpose of filing and prosecuting in the District Court a suit concerning certain property, it cannot, by restricting the authority of its resident agent, immunize itself against suit in that same court involving that same property."

Apparently, the key phrase in the foregoing is "suit in that same court involving that same property". While the defect in the opinion is far more fundamental than that phrase, the court was incorrect, Peti-

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[11] It is not surprising that the Court of Appeals did not bottom its decision upon Wilson's power of attorney. The Stipulation provision (R. 32), the Board resolution authorizing the power of attorney (R. 33), and the power itself (R. 34), all contained the limitations that Wilson was authorized to accept service only in proceedings between the United States and Interhandel which involved the interpretation and enforcement of the settlement stipulation, and "for no other purpose and no other extent whatsoever". *Kenny Construction Company v. Allen*, 101 U.S. App. D.C. 334, 248 F. 2d 656 (1957) recognized that a power of attorney could be so restricted as to prevent service of process for other than its expressed purpose.

[12] This is hardly so, since the situation, simply stated, is as follows: A sues B and recovers X dollars. C sues A to recover the X dollars.

tioner submits, in placing reliance upon the property being the same, i.e., money proceeds of vested stock. The instant suit is not an equitable one to enforce rights in property, and the court recognized this when it stated that Respondents "claim no equitable lien upon the funds held in the Interhandel account" (App. A, p. 9a).

When the opinion below is stripped of qualifying phrases, such as "under the total circumstances of the case" (App. A, p. 6a), "the right to serve process in any manner * * * permitted by law" (App. A, p. 6a), and "an action reasonably within the ambit of" an attorney's tasks (App. A, p. 6a), the lower court actually held that a practicing lawyer in the District of Columbia, who is representing a nonresident plaintiff in the courts there, may be served with process as an "agent" of the foreign corporation in a wholly different and independent piece of litigation. To say that this is novel is an understatement.

A strikingly similar case in the same court is *WICA* v. *WWSW,* 89 U.S. App. D.C. 308, 191 F. 2d 502 (1951), in which the court held that service of process on Washington, D. C. attorneys was improper. They represented the nonresident corporate defendants on monthly retainers and worked out a settlement for their clients with the plaintiff in a controversy before the Federal Communications Commission. The funds on account of the settlement, payable to plaintiff by defendants, passed through the attorneys' hands. Upon alleged failure to pay the balance, plaintiff filed suit in the District of Columbia, and had process served upon the attorneys as agents of defendants.

The Court of Appeals there said (p. 309 of 89 U.S. App. D.C.; p. 504 of 191 F. 2d):

> "Appellant argues (1) that making the agreement, and partially performing the same in the District

of Columbia through the attorneys, constituted a transacting of business therein; and (2) that attorneys Segal and Caldwell, by virtue of their retainer contracts and the authority reposed in them in connection with the compromise agreement, became agents of their nonresident corporate clients upon whom process might be served in the present suit growing out of the contract entered into and partially performed within the District. The appellees dispute both contentions.

"We think all the services rendered by Messrs. Segal and Caldwell fell within the attorney-client relationship, which prevailed throughout the circumstances related. The fact that the retainer agreements were for stated intervals did not alter the situation. Negotiation of the compromise agreement and settlement of the same as authorized by the clients did not convert the relationship into that of principal and agent. *Settlement of the proceedings before the Commission was akin to settlement of litigaiton before a court. The acts of the attorneys in carrying out the details of the accord, although specially authorized by the clients, were none the less legal services rendered within the scope of the attorney-client relationship.*" (emphasis supplied)

D. The Decision Below Denies Interhandel Due Process of Law

The due process clause of the Fifth Amendment, like its counterpart in the Fourteenth Amendment, requires that a nonresident corporate defendant have certain minimum contacts in the jurisdiction of the forum before it can validly be served with process to support an *in personam* judgment. *International Shoe Company* v. *Washington,* 326 U.S. 310, 90 L. Ed. 95 (1945). Petitioner quotes the following from this case to epitomize this Court's viewpoint:

"* * * Conversely it has been generally recognized that the casual presence of the corporate

> agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. [Citations omitted] To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process." (p. 317 of 326 U.S.; p. 102 of 90 L. Ed.)

Applying the principles of *International Shoe* to the instant case, it is clear that Interhandel did not have the type and kind of contacts with the District of Columbia which would permit it to be sued *in personam* by plaintiffs in a case where the cause of action is alleged to have occurred in Europe more than thirty years ago.[13] Superimposed upon the foregoing are the facts that the cause of action alleged in the instant suit is unrelated to the litigation instituted by Interhandel to recover its vested property; that Interhandel was required to bring its suit here in order to contest the seizure of its property (Trading with the Enemy Act, Section 9(a)); and that Interhandel actually stood in the position of a defendant in the Section 9(a) suit that it instituted in 1948 (*Societe Internationale* v. *Rogers, supra*).

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[13] Just before the above quotation, this Court observed in the *International Shoe* case:

> " 'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, *but also give rise to the liabilities sued on*, even though no consent to be sued or authorization to an agent to accept service of process has been given. [Citations omitted]" (Emphasis supplied)

Plainly, this removes Interhandel from the area of "presence".

CONCLUSION

The petition for a writ of certiorari should be granted.[14]

Respectfully submitted,

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Societe Internationale, etc.

September 1966

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[14] The Court's attention is called to remarks of Messrs. Stern & Grossman on pages 15 and 188 of their SUPREME COURT PRACTICE (2nd Ed.). Petitioner submits that the case cited by them on page 15, *Public Service Commission* v. *Brashear Freight Lines*, 306 U.S. 204, 83 L.Ed. 608 (1938) and the cases cited in that case, are not apposite to the case at bar. There, Section 266 of the Judicial Code was involved, which permitted appeal only from a *final* decree. Here, Petitioner is proceeding under 28 U.S.C. 1254(1), which does not require an adverse *judgment* of a court of appeals as a prerequisite to review by this Court.

Petitioner submits that the instant case is not moot within such cases as *Local No. 8-6* v. *Missouri*, 361 U.S. 363, 4 L.Ed.2d 373 (1960), and cases discussed in the Court's opinion.

Instead, Petitioner submits that *Chicago* v. *Atchison, etc.*, 357 U.S. 77, 2 L.Ed.2d 1174 (1958) is in point. Interhandel has been sued in the District Court here in two other actions aggregating $17,500,000. Mail service in Switzerland under Rule 4(i)(1)(D) F.R. Civ. P. was quashed and the cases are on appeal from final orders of dismissal (U.S.C.A.D.C.) Nos. 19,995 and 19,996). If the appeals fail, as Petitioner believes they will, it is anticipated that service of process under the instant case's formula will doubtless be attempted.

If the rule of Section II of the lower court's opinion should stand as the law of the District of Columbia, the District Court would be *bound* to follow the Court of Appeals' decision and deny motions to quash, and the Court of Appeals would not likely permit interlocutory appeals under 28 U.S.C. 1292(b) in the face of a denial of certiorari in the case at bar. Consequently, Petitioner would be obliged to endure the expense and inconvenience of two trials in the United States based upon the invalid type of service involved in the instant petition for certiorari.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19286

WALLY KELBERINE, et al., *Appellants*

v.

SOCIETE INTERNATIONALE, Etc., INTERHANDEL, Etc., et al., *Appellees*

Appeal from the United States District Court
for the District of Columbia

Decided April 7, 1966

Mr. Harold E. Stassen, of the bar of the Supreme Court of Pennsylvania, *pro hac vice,* by special leave of court, with whom *Mr. John Alvin Croghan* was on the brief, for appellants.

Mr. John J. Wilson, with whom *Mr. Frank H. Strickler* was on the brief, for appellee Societe Internationale Etc.

Mr. Richard S. Salzman, Attorney, Department of Justice, with whom *Mr. David C. Acheson,* United States Attorney at the time the brief was filed, and *Mr. Morton Hollander,* Attorney, Department of Justice, were on the brief, for appellees Katzenbach and Fowler, *Mr. Fred W. Drogula,* Attorney, Department of Justice, also entered an appearance for appellees Katzenbach and Fowler.

Before PRETTYMAN and WILBUR K. MILLER, *Senior Circuit Judges,* and DANAHER, *Circuit Judge.*

PRETTYMAN, *Senior Circuit Judge:* This law suit has an antecedent history. In years prior to World War II the appellee Societe Internationale, Etc.,[1] a Swiss holding

[1] Known to this litigation variously as I. G. Chemie and as Interhandel.

corporation, came into ownership of various American properties, including over 90 per cent of the stock of General Aniline and Film Corporation, a Delaware corporation. In 1942 this stock was vested in the Alien Property Custodian, succeeded by the Attorney General of the United States, under the Trading With the Enemy Act.[2] When the war was over, Interhandel in 1948 sued under Section 9(a) of the Act to recover the property. The litigation was extensive.[3] Finally, in 1963 the case was settled by an agreement written and filed in the suit.[4] Pursuant to that stipulation the General Aniline stock was sold at public auction, some three hundred twenty-nine million dollars being realized from the sale. The bids were opened March 9, 1965, and the shares delivered March 17, 1965. Interhandel's share of the proceeds was one hundred twenty million dollars. This share was deposited in a special account in the Treasury and is being held there, delivery to Interhandel having been delayed by the terms of the settlement and by this law suit.

Our appellants, Wally Kelberine and Lenka Berlin, two individuals, filed this civil action on March 16, 1965, the day before the delivery of the Aniline stock pursuant to the sale at auction. In their complaint they say they suffered under the Nazi conspiracy in Europe and that they are now, although they were not at the time of their loss and damage, citizens of the United States. They say they bring the action on behalf of all persons similarly situated, too numerous to bring before the court. They

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[2] 40 STAT. 411 (1917), as amended, 50 U.S.C. App. § 1, *et seq.*

[3] See Societe Internationale v. Rogers, 357 U.S. 197 (1958), *reversing* Societe Internationale, Etc. v. Brownell, 100 U.S. App. D.C. 148, 243 F. 2d 254 (1957); Societe Internationale, Etc. v. McGranery, 111 F. Supp. 435 (D.D.C. 1953), *aff'd sub nom.* Societe Internationale, Etc. v. Brownell, 96 U.S. App. D.C. 232, 225 F. 2d 532 (1955), *cert. denied*, 350 U.S. 937 (1956).

[4] Civil No. 4360 (D.D.C. 1948).

say the Attorney General and the Secretary of the Treasury intend to deliver to Interhandel the $120,000,000 proceeds from the sale. They further say that between 1933 and 1945 a number of men and corporations in Europe acted in a gigantic conspiracy (referred to as the "Nazi Conspiracy") in the course of which they illegally seized the property of plaintiffs and of the class they represent, and that they (meaning the conspirators) enforced slave labor upon plaintiffs and killed members of the families of plaintiffs. They further alleged that I. G. Farbenindustrie, a corporation, was an integral part of the Nazi conspiracy, participated in it, and profited from it, and has been declared officially by the United States Government to have been an integral part of that conspiracy. They say that Interhandel was a creature of Farbenindustrie and that it is and should be fully accountable and liable to the extent of the assets within the United States and to the extent of the losses and damages of the plaintiffs at the hands of the Nazi conspiracy. Plaintiffs say that the seizures, etc., were illegal under the valid laws of the states concerned and that the claims of plaintiffs rest further upon inherent natural law. They say the class they represent exceeds two hundred thousand persons.

Plaintiffs pray that the Attorney General and the Secretary be enjoined from paying to Interhandel any part of the $120,000,000, that plaintiffs as a class be adjudicated as having "the right to said $123,000,000 in funds", and "That upon the individual proof of claim by the Plaintiffs to a master or masters appointed by this Court, the Plaintiffs individually pro rata and equitably be paid said funds upon their adjudicated claims."

The Government defendants moved to dismiss on the grounds that, as to them, the court lacked jurisdiction and that the complaint failed to state a claim upon which relief could be granted. Defendant Interhandel moved to

dismiss "and/or" to quash the summons on the grounds that it was not subject to process in the District and that it had not been properly served. Plaintiffs proceeded to take depositions in pursuit of discovery. The motions were set for hearing April 9, 1965. Plaintiffs moved to continue them generally. The court granted the Government defendants' motion to dismiss and continued Interhandel's motion, setting it for hearing on April 29th. Plaintiffs took further depositions and moved to continue the hearing on the motion to a still later date to permit them to explore further certain phases of discovery. The court denied the motion to continue and granted Interhandel's motion to dismiss and to quash service of process. This appeal followed.

I

Did the District Court err in refusing to continue consideration of the motions to dismiss pending the further taking of depositions by plaintiffs? The subject of the depositions, so far as is indicated, was the doing of business by Interhandel in the District of Columbia. Plaintiffs had one continuance of twenty days and had taken several depositions directed to this subject. Interhandel claimed the subject had been covered exhaustively. The court sought a proffer from counsel for plaintiffs, pointing out that plaintiffs said the only business of Interhandel was fronting for Farben and owning the stock of General Aniline. Upon that basis the court thought the evidence already taken was enough. Plaintiffs said that by taking the further depositions they would have "a more comprehensive and complete view". We think the court was correct, and in any event the matter was primarily in its discretion.

II

Did the court err when it quashed the service? We think it did. The District of Columbia statute [5] provides that

[5] D.C. Code § 11-306 (1961 ed.).

the District Court here shall have cognizance "of all cases in law and equity between parties, both or either of which shall be resident or be found within said district". Interhandel came into the District to file a civil action concerning its property. It continued to prosecute that action. It appointed and maintained here an attorney in fact, who was authorized to accept service of all notices and process on its behalf for such proceedings between it and the Attorney General and "Treasurer of the United States" as may be necessary to the enforcement of the stipulation of settlement of the pending civil action and of any judgment entered in that action; and for no other purpose whatever. We think the institution and prosecution of a civil action in the court here clearly establishes the presence of the corporation here. It voluntarily subjected itself to the jurisdiction of the court; it could not do so *in absentia*. So we think Interhandel was clearly found here.[6]

Interhandel says appellants' contentions on this point fail because it has never transacted business here. It says Congress defined "doing business" when it exempted from license requirements corporations which merely prosecute litigation.[7] The statute does not read as Interhandel reads it. It exempts these corporations from the necessity of getting a license, but it notably does not say they are not doing business. Furthermore the liability of a foreign corporation to suit here does not depend upon its doing business here; it depends upon its being found here.

The corporation being found here and therefore subject to suit here, the next question concerns service of process: Upon whom could service be had? We think service upon

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[6] The "found" feature of this statute was discussed briefly by the Supreme Court in Graham v. Brotherhood of Firemen, 338 U.S. 232, 236 (1949).

[7] D.C. Code § 29-933(b) (1961 ed.)

the agent resident in the District was valid. His expressed authority was limited, to be sure. But it covered the law suit respecting the Interhandel property; he was empowered to accept service "for such proceedings between the parties to this Stipulation as may be necessary to the interpretation or enforcement, or both, of this Stipulation". The case at bar certainly involved the enforcement of the stipulation; indeed it sought to prevent that enforcement. It is true that proceeding was not between the parties to the stipulation, but all of those parties were parties to this suit. It could quite properly be held that process in this case fell within the agent's express authority. But we do not rest upon that power of attorney. We think that under the total circumstances of the case the agent of the corporation present in the District for the purpose of conducting the litigation in the courts here was subject to process in this suit. The statute says [8] that service may be made on a non-resident corporation by service thereof on "the registered agent", but it also provides [9] that nothing therein shall limit the right to serve process "in any other manner now or hereafter permitted by law." We are of opinion that, a foreign corporation being present in the District, its agent duly authorized to do the tasks for which it is present here may be served with process in its behalf in an action reasonably within the ambit of those tasks.[10]

We intend this ruling to be no broader than the case. We hold that, if a foreign corporation comes into the District of Columbia for the purpose of filing and prose-

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[8] D.C. CODE § 29-933i(a) (1961 ed.)

[9] *Id.*, § 29-933i(c).

[10] See the discussions by the Supreme Court in Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Perkins v. Benguet Mining Co., 342 U.S. 437 (1952); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

cuting in the District Court a suit concerning certain property, it cannot, by restricting the authority of its resident agent, immunize itself against suit in that same court involving that same property.

It is suggested that since, as appears in a moment, we affirm the dismissal of the complaint, the dispute concerning the service of process is moot and ought not to be decided. But on the other hand, if Interhandel was not susceptible to process in the District, the nature of the complaint, valid *vel non*, was immaterial. Thus we think decision upon the service-of-process point is an integral first step in the resolution of the controversy. Had we decided Interhandel was not subject to suit, there would have been an end to the matter. But, since we hold Interhandel to have been subject to suit and correctly served, we pass on to the problem of the dismissal of the complaint.

III

Did the court err in dismissing the action against the Government officers? We think it did not.

Pending in the court here was a civil action by Interhandel against the Attorney General concerning properties vested in him by virtue of a federal statute. The President, by a memorandum dated January 8, 1963, and under authority vested in him by statute,[11] determined that the interest of the United States required the sale of this property. The Attorney General had power to settle the litigation.[12] He settled it. One of the terms

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[11] Pub. L. No. 87-846, § 203, 76 STAT. 1113 (1962).

[12] Halbach v. Bumsted, 207 F. 2d 503 (3d Cir. 1953), *cert. denied sub nom.* Bumsted v. Markham, 347 U.S. 933 (1954); Standard Oil Co. v. Clark, 163 F. 2d 917 (2d Cir. 1947), *cert. denied*, 333 U.S. 873 (1948); Castell v. United States, 98 F. 2d 88 (2d Cir.), *cert. denied*, 305 U.S. 652 (1938).

of the stipulation of settlement was that the funds would be held by the United States as security for the performance by Interhandel of certain indemnity obligations imposed upon it by the agreement. (Sec. VIII(4).) Those obligations (Sec. IX(2)) were that Interhandel would hold harmless the United States and its officers and employees from any claim made relating to actions described in certain paragraphs of the stipulation, or resulting from compliance by any officer of the United States with the stipulation, and from any claim made relating to the control or operation of the General Aniline and Film Corporation by Interhandel, or any of its stockholders, or persons under its control, or successors to such persons. Further, Interhandel agreed (Sec. IX(2)) to indemnify the United States and its officers and employees from any claims brought by the Government of the Netherlands on behalf of itself or its political subdivisions, Interhandel or persons under its control, or any Dutch national person, in respect to the properties subject to the stipulation. The stipulation provided that the United States could recover sums due by reason of the indemnities either by payment or by cancellation of the securities in which the properties were invested. And it provided (Sec. VIII(4)) that redemptions of these properties for Interhandel could be made from time to time as the Attorney General determines that such securities are no longer needed to secure the performance by Interhandel of its indemnity obligations. Thus it is amply clear that the United States has an interest in these securities and that its officers are performing official duties involving judgment and discretion, not mere ministerial chores. The action was to require these officers to turn over to plaintiffs these securities and also to prevent them from carrying out the obligations of the stipulation of settlement. Thus the action is against the United States, which has not consented to it. It was correctly dismissed.

Plaintiffs cite and rely upon *Mellon* v. *Orinoco Iron Co.*[13] and *Houston* v. *Ormes.*[14] None of the criteria listed in those cases as premises for exceptions to the general rule respecting unconsented-to suits against the United States are present in the case at bar.[15]

Moreover, (although the point is immaterial in view of the foregoing) plaintiffs specifically and expressly asserted to the trial court that they claim no equitable lien upon the funds being held in the Interhandel account. Thus they are in a position of persons merely interested in the common good and, under the doctrine of *Massachusetts* v. *Mellon,*[16] have no standing to sue.

IV

Did the court err when it dismissed the complaint? We think it did not.

The thesis of the action is easily recognized from the outline we have given of the complaint. Interhandel is a creature of Farben. Farben was a part of the Nazi conspiracy of 1933-45. The Nazi conspiracy, in violation of the laws of the several states involved and of natural law, damaged these two plaintiffs and others, to a number of some two hundred thousand, destroying their property, killing their relatives, and reducing them to slave labor. Therefore all the property of Interhandel should be awarded by American courts to these plaintiffs, pro rata. We are of opinion the thesis is not presently susceptible of judicial implementation. It may be that the Congress might enact

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[13] 266 U.S. 113 (1924).

[14] 252 U.S. 469 (1920).

[15] And see Smith v. Harrah, 60 App. D.C. 258, 51 F. 2d 314 (1931), and McCormack v. Harrah (a companion case), 60 App. D.C. 260, 51 F. 2d 316 (1931).

[16] 262 U.S. 447 (1923).

a program and a procedure by which the objectives prayed for could be achieved. But we think the courts alone cannot do it. As presently framed, the problem is not within the established scope of judicial authority. It did not arise under the Constitution or laws of the United States, or within the territorial jurisdiction of the courts of the United States. The premises for these conclusions are many and easily seen. The span between the doing of the damage and the application of the claimed assuagement is too vague. The time is too long. The identity of the alleged tort feasors is too indefinite. The procedure sought—adjudication of some two hundred thousand claims for multifarious damages inflicted twenty to thirty years ago in a European area by a government then in power—is too complicated, too costly, to justify undertaking by a court without legislative provision of the means wherewith to proceed.

The complaint prays, as we have noted, that all the Interhandel funds be divided "pro rata and equitably" among the participating petitioners. If only the present two participate, they would receive sixty million dollars apiece. If the entire potential two hundred thousand damaged persons entered the proceeding, each would receive six hundred dollars. This method of award would be a novelty to us. The events, the witnesses, the guilty tort feasors, their membership in the conspiracy are all so potentially vague at this point as to pose an insoluble problem if undertaken by the courts without legislative or executive guidance, authorization or support. The whole concept is too uncertain of legal validity to sustain the self-establishment of the proceedings by a court in the absence of specific legislative or executive formulation. It seems to us that the trial court correctly dismissed the action for failure to state a claim upon which relief can be granted.

Affirmed.

APPENDIX B

Constitutional Provision and Statutes Involved

Fifth Amendment to U. S. Constitution:

"No person * * * shall be deprived of * * * property, without due process of law; * * *"

Section 9(a), Trading with the Enemy Act (50 U.S.C. App. 9a):

"Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall be conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; * * * if the claimant shall have filed the notice as above required and shall have made no application to the President, *said claimant may institute a suit in equity in the Supreme Court of the District of Columbia* [*United States District Court for the District of Columbia*] *or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business* (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, * * *" (emphasis supplied)

District of Columbia Code (1961 Ed.) Supp. V

Section 11-521. Civil and criminal jurisdiction.

"(a) Except in actions or proceedings over which exclusive jurisdiction is conferred by law upon other courts in the District, the United States District Court for the District of Columbia, in addition to its jurisdiction as a United States district court and to any other jurisdiction

conferred by law, has all the jurisdiction possessed and exercised by it on January 1, 1964, and has original jurisdiction of all:

(1) civil actions between parties, where either or both of them are resident or found within the District; and

(2) offenses committed within the District.

(b) Except as otherwise specially provided, an action may not be brought in the District Court by original process against a person who is not resident or found within the District. (Dec. 23, 1963, 77 Stat. 482, Pub. L. 88-241, § 1.)"

Section 29-933(i)(c):

"If any foreign corporation shall transact business in the District without a certificate of authority, it shall, by transacting such business, be deemed to have thereby appointed the Commissioners its agent and representatives upon whom any process, notice, or demand may be served. Service shall be made by delivering to and leaving with the Commissioners, or with any clerk having charge of their office, duplicate copies of such process, notice, or demand, together with an affidavit giving the latest known post office address of such corporation and such service shall be sufficient if notice thereof and a copy of the process, notice, or demand are forwarded by registered mail or certified mail addressed to such corporation at the address given in such affidavit."

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 539

SOCIETE INTERNATIONALE, ETC., (INTERHANDEL), PETITIONER

v.

WALLY KELBERINE AND LENKA BERLIN

No. 549

WALLY KELBERINE AND LENKA BERLIN, ET AL., PETITIONERS

v.

SOCIETE INTERNATIONALE, ETC. (INTERHANDEL); RAMSEY CLARK, ACTING ATTORNEY GENERAL, AND HENRY FOWLER, SECRETARY OF THE TREASURY

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE ACTING ATTORNEY GENERAL AND THE SECRETARY OF THE TREASURY IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a)[1] is reported at 363 F. 2d 989.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1966, and a timely motion for rehearing was denied on June 16, 1966. The petition in No. 539 was filed on September 9, 1966; the petition in No. 549 was filed on September 13, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTE INVOLVED

Section 9(a) of the Trading with the Enemy Act, 50 U.S.C. App. 9(a) is set out in the Appendix, *infra*, pp. 13-16.

QUESTION PRESENTED

In 1963, Societe Internationale and the Attorney General settled the litigation between them relating to the ownership of certain shares of General Aniline & Film Corporation stock vested by the Alien Property Custodian in 1942. So far as the governmental respondents are concerned, the question presented is whether the suit brought by petitioners Kelberine and Berlin to enjoin the Attorney General and the Secretary of the Treasury from making payments to Societe Internationale in accordance with the terms of that settlement was properly dismissed as an unconsented suit against the United States.

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[1] "Pet. App." refers to the appendix to the petition in No. 549. "J.A." refers to the Joint Appendix in the court of appeals.

STATEMENT

1. *The nature of the action.* Petitioners Kelberine and Berlin[2], brought this action in March 1965, on behalf of themselves and all others "similarly situated," to recover the damages they allegedly suffered at the hands of the Nazi regime in Europe between 1933 and 1945, prior to their emigrating to the United States and becoming American citizens. The complaint alleged that petitioners were entitled to recover against the defendant Societe Internationale—a Swiss holding company, commonly known as "Interhandel"— on the ground that Interhandel was the "creature" of I. G. Farbenindustrie, a German corporation, which was part of the "Nazi conspiracy" that was responsible for petitioners' injuries. Petitioners did not allege that either of them was directly injured by Interhandel or I. G. Farben.

Petitioners joined the Attorney General and the Secretary of the Treasury as co-defendants in an attempt to insure their recovery in the event they prevailed in the suit against Interhandel. They sought by this means to reach $120,000,000 then being held in the United States Treasury for Interhandel's account. Petitioners conceded that they did not claim

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[2] Cases No. 539 and 549 both seek review of the same decision of the court of appeals, which affirmed, as to all defendants, the dismissal of the complaint filed by petitioners in No. 549. Although Interhandel has also petitioned for certiorari (No. 539)—raising issues relevant only to the controversy between it and Mesdames Kelberine and Berlin—we shall, for convenience, refer to the latter as "petitioners" and to all other parties by name.

an equitable lien upon the fund in the Treasury but were merely potential judgment creditors against Interhandel (J.A. 100-101). The complaint asked that the governmental defendants be enjoined from paying any of that money to Interhandel pending the resolution of petitioners' lawsuit against the corporation; that the class which petitioners claimed to represent be awarded judgment of the entire $120,000,000; and that petitioners' individual claims be paid "pro rata" out of that sum.

2. *The fund in the Treasury.* The money in the Treasury account represented a portion of the proceeds realized from the public sale of certain shares of General Aniline & Film Corporation stock. The shares in question had been owned by Interhandel and were vested by the Alien Property Custodian in 1942 as enemy property under the Trading with the Enemy Act, 50 U.S.C. App. 1, *ff.* After the war, Interhandel brought suit under Section 9(a) of that Act for return of the vested shares. The extensive litigation which ensued [3] was finally ended in 1963 by a stipulation of settlement (J.A. 79-89) entered into between the Attorney General [4] and Interhandel and filed with the district court. *Societe Internationale* v. *Kennedy* (C.A. No. 4360-48, D.D.C.).

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[3] See, *Societe Internationale* v. *Rogers*, 357 U.S. 197, reversing *Societe Internationale* v. *Brownell*, 243 F.2d 254 (C.A. D.C.); *Societe Internationale* v. *McGranery*, 111 F. Supp. 435 (D.D.C.), affirmed *sub nom. Societe Internationale* v. *Brownell*, 225 F.2d 532 (C.A.D.C.), certiorari denied, 350 U.S. 937.

[4] By Executive Order No. 9788 of October 14, 1946, 11 Fed. Reg. 11981, the Attorney General succeeded to the powers and duties of the Alien Property Custodian.

Under the terms of the settlement, the vested General Aniline stock was sold to the public in March 1965. Some $329,000,000 was realized from the sale, of which approximately $120,000,000 represented Interhandel's share.[5] The settlement agreement, however, expressly subjected Interhandel's share to indemnity provisions in favor of the government (Secs. VIII and IX, J.A. 84-89). In particular, Interhandel agreed to "indemnify and hold harmless the United States, the Attorney General and all other officers, agents and employees of the United States from any and all claims, actions, or liabilities" which might arise from carrying out the terms of the settlement, from the operations of General Aniline & Film Corporation while under government control, and from the claims of certain other persons and the Netherlands Government relating to the ownership of the shares sold (Sec. IX(2), J.A. 86-87).

To insure Interhandel's performance of its indemnity agreement, the stipulation of settlement further provided that Interhandel was not to receive its portion of the proceeds of sale immediately. Rather, its

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[5] Pursuant to Section 39 of the Trading With the Enemy Act, 50 U.S.C. App. 39, the bulk of the government's share of the settlement proceeds were transferred to the War Claims Fund to be used in satisfying the claims of American citizens who suffered losses in World War II. Petitioners are ineligible for awards from that fund, which may only be made to persons who were American nationals at the time the loss or injury occurred. 50 U.S.C. App. 2017c. It should be noted, however, that petitioners have already received some compensation from German authorities (J.A. 51-52) and that other avenues of relief may be open to them elsewhere (J.A. 22-28).

share would be deposited in an account in its name in the Treasury and invested in U. S. Treasury obligations to "be held by the United States as security for the faithful performance by Interhandel of the indemnity obligations imposed upon it" (Sec. VIII(1), VIII(4), J.A. 84-85). If any liability were imposed which Interhandel was required to indemnify, the government had the right to cancel an appropriate amount of those Treasury obligations. Sec. IX(5), J.A. 89. The funds in the Treasury could be released to Interhandel only when and to the extent that "the Attorney General determines that such securities are no longer needed to secure the faithful performance by Interhandel of the indemnity obligations imposed upon it by * * * this Stipulation [of Settlement]" (Sec. VIII(4), J.A. 84-85).

3. *The proceedings below.* The district court dismissed petitioners' complaint against the governmental respondents as an uncontested suit against the United States (J.A. 102-103). It also dismissed the suit against Interhandel for want of *in personam* jurisdiction (J.A. 200). The court of appeals affirmed both dismissals. As to Interhandel, however, it held that there was *in personam* jurisdiction in the particular circumstances of this case, but that the complaint was properly dismissed for failure to state a claim upon which relief could be granted.

Petitioners' applications for "a stay pending appeal"—*i.e.*, an injunction against the payment of any money to Interhandel *pendente lite*—were denied by the district court on April 9, 1965, by the District of Columbia Circuit on April 12, 1965, by both the Chief

Justice and Mr. Justice Harlan on April 14, 1965, and by the court of appeals again on May 6, 1965.[6]

ARGUMENT

The decision below, affirming the district court's dismissal of the complaint against the Attorney General and Secretary of the Treasury, is clearly correct. There is no conflict or other occasion for review by this Court.

1. It is well settled that, in the absence of an express waiver of sovereign immunity, no court may entertain a suit against the United States.[7] An action nominally against government officials is, in reality, a suit against the United States "if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' *Land* v. *Dollar*, 330 U.S. 731, 738, * * * or if the effect of the judgment would be 'to restrain the Government from acting, or compel it to act.' *Larson* v. *Domestic & Foreign Corp.*, [337 U.S. 682] at 704 * * *." *Dugan* v. *Rank*, 372 U.S. 609, 620. Petitioners' admitted purpose in naming the government officers as defendants in the present case was to reach

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[6] Following those denials, partial payment of Interhandel's share of the proceeds of the sale of the G.A.F. stock was made to that corporation in accordance with the stipulation of settlement. Approximately $31,000,000 is retained on deposit in the Interhandel account in the Treasury pursuant to the terms of the settlement agreement.

[7] *Mine Safety Co.* v. *Forrestal*, 326 U.S. 371; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682; *Malone* v. *Bowdoin*, 369 U.S. 643; *Dugan* v. *Rank*, 372 U.S. 609; *Hawaii* v. *Gordon*, 373 U.S. 57.

a large sum of money presently in the United States Treasury and to prevent the two cabinet officers from carrying out the terms of an agreement settling a major lawsuit against the government. Thus, as the court of appeals correctly ruled, "the action is against the United States, which has not consented to it" (Pet. App. 9a).

Petitioners appear to base their right to maintain this suit on the theory that this is an action against government officials who have exceeded their statutory authority. See *Dugan* v. *Rank*, *supra*, 372 U.S. at 621-622. Specifically, they assert that the Attorney General lacked authority to settle the suit brought by Interhandel to regain its vested assets. This contention is patently without merit. The courts have uniformly upheld the Attorney General's right to compromise litigation under Section 9 when he deemed it to be in the best interest of the United States to do so. *Halbach* v. *Markham*, 106 F. Supp. 475 (D. N.J.), affirmed *sub nom. Halbach* v. *Bumsted*, 207 F.2d 503 (C.A. 3), certiorari denied, 347 U.S. 933; *Standard Oil Co.* v. *Markham*, 64 F. Supp. 656, 666-667 (S.D.N.Y.), modified on other points *sub nom. Standard Oil Co.* v. *Clark*, 163 F.2d 917 (C.A. 2), certiorari denied, 333 U.S. 873; *Castell* v. *United States*, 98 F.2d 88 (C.A. 2), certiorari denied, 305 U.S. 652.

Contrary to petitioners' assertion (Pet. 7), the 1962 amendment to Section 9(a)[8] did not limit the Attorney General's authority to settle Interhandel's

[8] Act of October 22, 1962, 76 Stat. 1113, 50 U.S.C. App. 9(a).

lawsuit. Prior to 1962, Section 9(a) prohibited the sale of vested property in litigation, without the parties' consent, until the suit was ended. The sole purpose of the 1962 amendment was to permit the sale of such property, without consent, where "the interest and welfare of the United States require the sale." As the legislative history makes clear, the amendment was intended to increase, not to circumscribe, the Attorney General's discretion in alien property matters. In fact, that Act was specifically designed to permit the sale of the General Aniline shares involved here. See H. Conf. Rep. No. 2513, 87th Cong., 2d Sess., 2 U.S. Code Cong. & Admin. News 3841, 3842 (1962).

Petitioners rely solely on the provision in the 1962 amendment that the proceeds of sales *pendente lite* authorized by that amendment are to be "held in trust by the Secretary of the Treasury pending the entry of final judgment in any such suit." This provision does not divest the Attorney General of the authority to settle. Before the amendment, Section 9 (a) similarly required vested property to be retained in the Treasury or by the Custodian "until final judgment or decree" in suits under that Section. As we have noted (*supra*, p. 8), this language did not preclude the Attorney General from settling appropriate cases. Nothing in the 1962 amendment or its legislative history supports petitioners' contention that Congress wanted to put parties in Section 9 cases to the additional, expensive and useless formality of prolonging their litigation to final judgment when

all concerned had reached agreement settling their rights.[9]

In addition, as the court below also held, petitioners have no standing to challenge the settlement of Interhandel's suit against the Attorney General. Petitioners were not parties to that litigation and admittedly have no interest in the proceeds of settlement except as potential judgment creditors of Interhandel (Pet. 7). Indeed, had the Attorney General not settled the *Interhandel* litigation, the fund in question would not have been created. Petitioners are thus in the anomalous position of attacking the Attorney General's right to settle the case while attempting, at the same time, to retain the fruits of that settlement for themselves. In essence, their interest is simply that shared

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[9] Petitioners appear to have abandoned the alternate theory urged below that their right to maintain this suit is supported by *Mellon* v. *Orinoco Iron Co.*, 266 U.S. 121, and *Houston* v. *Ormes*, 252 U.S. 469. The court below properly held that the narrow criteria of those cases were not met here (Pet. App. 9a). Unlike the present case, those cases involved funds in which the government concededly had no interest and which were held by the Secretary of the Treasury solely for the ministerial act of payment to a specified third party, an act compellable by mandamus. In such circumstances, the Court held that a party claiming "an equitable right" in the fund could enjoin disbursement pending his suit against the payee, provided that the court had jurisdiction over the payee so that the decree would bind him and constitute a good acquittance to the United States. The Court was careful to note that its decision was confined to the narrow circumstances outlined above. See 252 U.S. at 473; see, also, *Smith* v. *Harrah*, 51 F. 2d 314 (C.A.D.C.); *McCormack* v. *Harrah*, 51 F. 2d 316 (C.A.D.C.); *Schmitz* v. *Societe Internationale*, 249 F. Supp. 757 (D.D.C.), affirmed on the opinion of the district court, Nov. 14, 1966, Nos. 19,995, 19,996, C.A.D.C.

with all other citizens in seeing that the Attorney General faithfully executes his duties under the law. That is not sufficient to give them standing to sue in federal court. *Massachusetts* v. *Mellon*, 262 U.S. 447; *Pauling* v. *McElroy*, 278 F. 2d 252 (C.A.D.C.), certiorari denied, 364 U.S. 835.

2. There is no substance to petitioners' contention (Pet. 10) that the district court's refusal to grant a further continuance for the taking of depositions constituted a denial of due process. The questions raised by petitioners—the Attorney General's authority to settle Interhandel's suit and the meaning of the 1962 amendment to Section 9(a)—were purely legal issues; they did not require extensive depositions for their proper resolution. The court of appeals correctly ruled that the district court did not abuse its discretion in this matter.

CONCLUSION

The petition for a writ of certiorari in No. 549 to review the judgment in favor of the Attorney General and the Secretary of the Treasury should be denied.[10]

Respectfully submitted.

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Attorneys.

NOVEMBER 1966.

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[10] In No. 539, Interhandel asks this court to review that portion of the decision below which held it present in the District of Columbia for purposes of *in personam* jurisdiction. Without taking any position as to the correctness of that ruling, which the court of appeals carefully limited to the somewhat unusual circumstances of this case (Pet. App. 7a), we point out that the judgment of the court of appeals was entirely in Interhandel's favor, having affirmed the dismissal of petitioners' suit against it. Thus, in the event the Court does not grant certiorari to petitioners in No. 549, the issues raised in No. 539 are academic as to the parties to the instant suit. In such circumstances, we suggest that the petition in No. 539 does not present an appropriate matter for review by this Court. Cf. *Public Service Commission* v. *Brashear Lines*, 306 U.S. 204, 206; Stern & Gressman, *Supreme Court Practice*, pp. 21-22 (3d ed., 1962).

APPENDIX

The pertinent portion of Section 9 of the Trading With the Enemy Act, 50 U.S.C. App. 9 provides:

> (a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the

President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act [sections 1-6, 7-39, and 41-44 of this Appendix], and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated: *Provided further*, That upon a determination made by the President, in time of war or during any national emergency declared by the President, that the interest and welfare of the United States require the sale of any property or interest or any part thereof claimed in any suit filed under this sub-

section and pending on or after the date of enactment [Oct. 22, 1962] of this proviso the Alien Property Custodian or any successor officer, or agency may sell such property or interest or part thereof, in conformity with law applicable to sales of property by him, at any time prior to the entry of final judgment in such suit. No such sale shall be made until thirty days have passed after the publication of notice in the Federal Register of the intention to sell. The net proceeds of any such sale shall be deposited in a special account established in the Treasury, and shall be held in trust by the Secretary of the Treasury pending the entry of final judgment in such suit. Any recovery of any claimant in any such suit in respect of the property or interest or part thereof so sold shall be satisfied from the net proceeds of such sale unless such claimant, within sixty days after receipt of notice of the amount of net proceeds of sale serves upon the Alien Property Custodian, or any successor officer or agency, and files with the court an election to waive all claims to the net proceeds, or any part thereof, and to claim just compensation instead. If the court finds that the claimant has established an interest, right, or title in any property in respect of which such an election has been served and filed, it shall proceed to determine the amount which will constitute just compensation for such interest, right, or title, and shall order payment to the claimant of the amount so determined. An order for the payment of just compensation hereunder shall be a judgment against the United States and shall be payable first from the net proceeds of the sale in an amount not to exceed the amount the claimant

would have received had he elected to accept his proportionate part of the net proceeds of the sale, and the balance, if any, shall be payable in the same manner as are judgments in cases arising under section 1346 of Title 28. The Alien Property Custodian or any successor officer or agency shall, immediately upon the entry of final judgment, notify the Secretary of the Treasury of the determination by final judgment of the claimant's interest and right to the proportionate part of the net proceeds from the sale, and the final determination by judgment of the amount of just compensation in the event the claimant has elected to recover just compensation for the interest in the property he claimed.

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